

## THE STATE OF NEW HAMPSHIRE

### SUPREME COURT

**In Case No. 2004-0854, Multi-Pro Flooring, LLC v. Michael Johnson d/b/a MJ Interiors, the court on December 5, 2005, issued the following order:**

The plaintiff, Multi-Pro Flooring, appeals an order of the trial court that granted its motion for summary judgment but scheduled a hearing on the issue of damages despite the defendant's failure to file an objection or countervailing affidavit. The plaintiff contends that the trial court erred when it subsequently denied the plaintiff's request for damages based upon lost profits and upon a violation of RSA chapter 358-A and its request for attorney's fees. We affirm in part and vacate and remand in part.

The plaintiff first argues that the trial court erred in failing to award the damages set forth in the plaintiff's supporting affidavit because no counter-affidavit had been filed. "While the trial court on a motion for summary judgment is not authorized to consider facts wholly outside the record, neither do we require that it close its eyes when presented with reliable evidence that a genuine issue of material fact exists." *Lortie v. Bois*, 119 N.H. 72, 75 (1979); see RSA 481:8-a, III (summary judgment may be rendered on issue of liability alone if genuine issue as to amount of damages exists). In reviewing the trial court's summary judgment rulings, we consider the evidence in the light most favorable to the non-moving party. *Hopkins v. Fleet Bank – NH*, 143 N.H. 385, 388 (1999). The plaintiff's motion for summary judgment was filed one day after the defendant filed a statement raising issues concerning his liability and asserting a counterclaim. One of the plaintiff's supporting affidavits sought lost profit damages based upon the statement that "we will in all likelihood never regain [work with Home Depot that was allegedly lost due to the defendant's defective performance]." Construed in the light most favorable to the defendant, the trial court could have found that a genuine issue of fact existed as to the amount of damages incurred by the plaintiff.

The plaintiff also argues that the trial court erred in failing to award damages pursuant to RSA chapter 358-A, because its motion for summary judgment requested treble damages based upon RSA chapter 358-A and the motion had been granted. The court order granting the motion was brief: "No counter-affidavit having been filed by the defendant, the plaintiff's motion for summary judgment is granted. See RSA 491:8-a (1997). A hearing shall be scheduled on the issue of damages." We find no error in the trial court's subsequent determination that the plaintiff was not entitled to damages under RSA chapter 358-A. To the extent that the plaintiff argues that the trial court

was bound by its earlier ruling, we disagree. See Coburn v. Equity Associates, 116 N.H. 522, 524 (1976) (“Once the court has been given the power to grant summary judgment, it has all the powers which are inherent in the court, including the power and duty to reexamine its judgment when the proper case is presented and to set aside the judgment if the court considers it to have been made in error.”). We note that although the plaintiff requested an award of damages under RSA chapter 358-A, it failed to cite any specific provision of that chapter. To the extent that it argues that the trial court erred on the merits of this claim, we also disagree. See State v. Moran, 151 N.H. 450, 452 (2004). While the plaintiff argues in passing that it was entitled to a trial on this issue if the court intended to reverse its summary judgment order, this argument was not presented to the trial court in its motion for reconsideration. We therefore decline to review it. See State v. Blackmer, 149 N.H. 47, 48 (2003) (supreme court will not review any issue not raised before trial court); N.H. Dep’t of Corrections v. Butland, 147 N.H. 676, 679 (2002) (issues arising subsequent to trial may be raised before trial court in motion for reconsideration).

The plaintiff also argues that the trial court erred in denying its request for lost profits. This claim was based upon the plaintiff’s alleged loss of profits from Home Depot. The trial court found that the claim for lost profits was not pled in either the original complaint or the motion to amend. It further found that there was no basis in law or fact to award damages to the plaintiff under RSA chapter 358-A. Lost profits are a form of consequential damages that are reasonably foreseeable losses that flow from a breach of the contract. Drop Anchor Realty Trust v. Hartford Fire Ins. Co., 126 N.H. 674, 678-79 (1985). The record in this case contains no evidence that the plaintiff’s relationship with Home Depot would have continued for two years, that the defendant was aware of the relationship or that the defendant could have reasonably foreseen that any breach of his contract with the plaintiff would result in these alleged lost profits. Because the record before us compels a finding that the plaintiff failed to establish a claim for lost profits, we find no error in this ruling.

Finally, the plaintiff argues that the trial court erred in failing to award attorney’s fees because the agreement between the parties authorized such an award. The indemnity provision of the parties’ contract provided that “to the fullest extent that is permitted by law” the subcontractor would indemnify the contractor “against claims, damages, losses and expenses including but not limited to attorney fees, arising or resulting from performance of the subcontractor’s work and actions under this contract.” We have previously held that an indemnitee is entitled to recover attorney’s fees from an indemnitor in a suit for indemnification. Morse v. Ford, 118 N.H. 280, 281 (1978). Because the plaintiff recovered some damages from the defendant under their contract, it is also entitled to reasonable attorney’s fees incurred in presenting its successful claim. We therefore vacate and remand that portion of the trial court’s ruling that denied the plaintiff’s request for attorney’s fees to allow the court to determine the amount of reasonable fees attributable to the successful claim. In

all other respects, the decision of the trial court is affirmed.

~~Affirmed in part; vacated and remanded in part.~~

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

**Eileen Fox,  
Clerk**